



August 1, 2001

Ms. Lisa Aguilar  
Assistant City Attorney  
City of Corpus Christi  
P.O. Box 9277  
Corpus Christi, Texas 78469-9277

OR2001-3342

Dear Ms. Aguilar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150145.

The City of Corpus Christi Police Department (the "department") received requests for information relating to complaints filed against the department or its officers since May 4, 1997. You indicate that you will make some of the requested information available to the requestor. However, you claim that some of the requested information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. Section 143.089 of the Local Government Code provides in pertinent part:

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<sup>1</sup>We note that you also raised section 552.108 as an exception to disclosure. However, you did not submit any arguments applying section 552.108 to the submitted information. Therefore, we do not address whether any of the submitted information is excepted from disclosure under section 552.108. *See* Gov't Code §§ 552.301, .302. We also note that you did not raise section 552.130 as an exception to disclosure until fifteen business days after you received the request for information. However, because section 552.130 can provide a compelling reason for withholding information, we will address whether any of the submitted information is excepted under section 552.130. *See* Gov't Code §§ 552.301(a), (b), .302.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

....

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter ....

....

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Thus, section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee and another that may be maintained by the city's fire and police departments. Information contained in personnel files maintained by the civil service director in accordance with chapter 143, including all records from the employing police department relating to misconduct by police officers that resulted in disciplinary action, must be released to the public unless the information comes within one of the Public Information Act's exceptions to required public disclosure. However, information contained in a personnel file held by the police department is confidential pursuant to section 143.089(g) and may not be disclosed under the Act.

You indicate that Exhibit N consists of a representative sample of documents relating to misconduct that did not result in disciplinary action for the purpose of section 143.089. Because the department has taken no disciplinary action against the police officer involved, you indicate that Exhibit N has been placed in the department's personnel file on the police officer. Consequently, Exhibit N must be withheld in its entirety under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

You also contend that Exhibit M is confidential under section 143.089(g) because, while it is information that relates to misconduct that resulted in disciplinary action as contemplated by section 143.089(a)(2), the information is not "from the employing department." However, while some of the information in Exhibit M may not have been

created by the police chief to impose discipline, it was clearly collected by the Corpus Christi Police Department in its investigation of the police officers involved. Section 143.089(a)(2) does not restrict the scope of information required to be placed in a civil service file solely to information that the police chief created or that indicates some final action taken by the department. Rather, section 143.089(a)(2) applies to any information received by the civil service director or the director's designee from the police department. Furthermore, this office has read section 143.089 to require that any information held by the employing department and relating to employee misconduct must be placed in the civil service file if the misconduct resulted in disciplinary action. Thus, while the information in Exhibit M is currently in the department's personnel files, it must also be placed in the civil service personnel files. Furthermore, as information in the civil service file, Exhibit M is not confidential under subsection (g). Exhibit M may only be withheld to the extent it falls under another exception to disclosure. You also indicate that the information in Exhibits C through L are maintained in civil service personnel files. Thus, we will address the remainder of your arguments with respect to Exhibits C through M.

We first address your other arguments under section 552.101 of the Government Code. You contend that portions of Exhibit D are confidential under common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Exhibit D relates to an investigation of sexual harassment. Because there is no adequate summary of the investigation, you must release Exhibit D entirely. However, based on *Ellen*, you must withhold the identity of the victim of the harassment from Exhibit D. We have marked the information in Exhibit D that must be withheld under common law privacy.

You also contend that portions of Exhibits E, F, H, I, K, and L are confidential under common law privacy. We find that portions of Exhibits H and I contain information protected under common law privacy. However, even if we were to assume the remainder of the information you seek to withhold in Exhibits E, F, H, I, K, and L constituted intimate or embarrassing information for purposes of common law privacy, we believe the public has a legitimate interest in this information because it relates to the job performance and discipline of the peace officers involved. *See* Open Records Decision Nos. 594 at 5 (1991), 444 at 5-6 (1986), 405 at 2-3 (1983). Therefore, we find that you may withhold only those portions of Exhibits H and I that we have marked under common law privacy. You may not withhold the remainder of Exhibits H and I or any portion of Exhibits E, F, K, or L under common law privacy.

You also contend that a portion of exhibit H is excepted under section 552.101 because it is confidential under section 1703.306 of the Occupations Code. Section 1703.306 of the Occupations Code prohibits the public disclosure of the results of polygraph examinations. Occ. Code § 1703.306. Thus, the polygraph results contained in Exhibit H are confidential under section 1703.306 of the Occupations Code. We note that Exhibit I also contains polygraph results that are confidential under section 1703.306. We have marked the polygraph result information in Exhibits H and I, which must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Next, you contend that Exhibit M-6 consists of criminal history information that is confidential for the purpose of section 552.101. We note that Exhibit M-7 also appears to contain criminal history information. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Furthermore, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Therefore, we conclude that the city must withhold from required public disclosure Exhibits M-6 and M-7 under section 552.101 of the Government Code. *See id.*; *see also* Gov't Code § 411.106(b).

You contend that the information in Exhibit M-12 is confidential under section 773.091 of the Health and Safety Code. Section 773.091 provides:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

This confidentiality "does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services." Health & Safety Code § 773.091(g). Furthermore, information confidential under section 773.091(b) may be released in limited circumstances. *See id.* § 773.092. Exhibit M-12 consists of an "ambulance patient record" signed by an emergency medical technician. Based on your argument and our review of the document, we agree that Exhibit M-12 is confidential under section 773.091(b) of the Health and Safety Code. Therefore, you must withhold Exhibit M-12 under section 552.101 of the Government Code except for information required to be released under section 773.091(g).

Similarly, you contend that some of the information in Exhibit L is confidential under section 159.002 of the Occupations Code, known as the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Here, you do not indicate nor does it appear that any of the information in Exhibit L consists of either communications between a physician and patient or records created by or for a physician. Therefore, we find that none of the information in Exhibit L is confidential under the MPA.

We also note that Exhibit M-5 contains an individual's social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from

disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in Exhibit M-5 is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

You also contend that the submitted documents contain information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, you must withhold peace officers' home addresses, home telephone numbers, social security numbers, and family member information from the submitted information under section 552.117(2).

Finally, you contend that a portion of the submitted information is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Thus, you must withhold the Texas license plate information contained in Exhibits H and J under section 552.130.

In summary, you must withhold Exhibit N under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. You must withhold the identity of the sexual harassment victim from Exhibit D under section 552.101 and common law privacy. You must also withhold the information we have marked in Exhibit H and I under section 552.101 and common law privacy. You must withhold the marked polygraph result information in Exhibits H and I under section 552.101 in conjunction

with section 1703.306 of the Occupations Code. You must also withhold Exhibits M-6 and M-7 as confidential criminal history record information under section 552.101. You must withhold Exhibit M-12, except for information required to be released under section 773.091(g), under section 552.101 in conjunction with 773.091(b) of the Health and Safety Code. You must withhold the social security number contained in Exhibit M-5 under section 552.101 in conjunction with the Social Security Act if the number was obtained or maintained by the department pursuant to a provision of law enacted on or after October 1, 1990. You must withhold any home address, home telephone number, social security number, or family member information of peace officers under section 552.117(2). Finally, you must withhold the Texas license plate information contained in Exhibits H and J under section 552.130. You must release the remainder of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Nathan E. Bowden".

Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 150145

Enc: Submitted documents

c: Mr. Michael C. F. White  
2554 Lincoln Boulevard, #209  
Marina Del Rey, California 90291  
(w/o enclosures)